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15

16 UNITED STATES DISTRICT COURT
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 CENTER FOR BIOLOGICAL DIVERSITY
19 THE BAY INSTITUTE

CASE NO. 3:09-cv-05370-MHP

20 Plaintiffs,

STIPULATED SETTLEMENT AGREEMENT

21 v.

22 KEN SALAZAR, SECRETARY OF
23 DEPARTMENT OF
24 INTERIOR, and U.S. FISH AND
WILDLIFE SERVICE;

25 Defendants.
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1 This Stipulated Settlement Agreement is entered into by Plaintiffs, Center for Biological
2 Diversity and The Bay Institute (collectively “Plaintiffs”) and Defendants, the United States Fish
3 and Wildlife Service (“the Service”) and Ken Salazar, Secretary of the United States Department
4 of the Interior (collectively “Defendants”).

5 WHEREAS, on August 8, 2007, the Service received a petition from Plaintiffs to list the
6 San Francisco Bay-Delta (“SFBD”) population of longfin smelt (*Spirinchus thaleichthys*) under
7 the Endangered Species Act (“ESA”) as a threatened or endangered distinct population segment
8 (“DPS”) and designate critical habitat for the species;

9 WHEREAS, on May 6, 2008, the Service published an initial positive 90-day finding
10 pursuant to 16 U.S.C. § 1533(b)(3)(A) concluding that the petition provided substantial
11 information indicating that listing the SFBD population of longfin smelt as a DPS may be
12 warranted, and initiated a status review. *See* 73 Fed. Reg. 24911;

13 WHEREAS, on April 9, 2009, the Service published a finding pursuant to 16 U.S.C. §
14 1533(b)(3)(B) (“12-month finding”) concluding that listing the SFBD population of longfin
15 smelt was not warranted because it did not meet the definition of a DPS and therefore did not
16 constitute a listable entity under the ESA. *See* 74 Fed. Reg. 16169;

17 WHEREAS, in the April 9, 2009 12-month finding, the Service stated that it was
18 “initiating a range wide status assessment of the longfin smelt” throughout its range in Alaska,
19 Canada, Washington, Oregon, and California, and would also evaluate “whether the best
20 available scientific information suggests that the San Francisco Bay-Delta population of the
21 longfin smelt may be considered to occupy a significant portion of the range (“SPR”), and
22 institute appropriate action.” *Id.* at 16174;

1 WHEREAS, on November 13, 2009, Plaintiffs filed their Complaint in this case, alleging
2 that the Service's April 9, 2009 12-month finding violated the ESA and was arbitrary and
3 capricious in concluding that the SFBD population of longfin smelt did not meet the definition of
4 a DPS, and in concluding that listing the SFBD population as threatened or endangered was not
5 warranted;

7 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
8 FOLLOWS:

9 1. The Service will complete a new 12-month finding on the longfin smelt by September
10 30, 2011,¹ based on the rangewide status review of the longfin smelt that is currently underway.
11 This status review will be conducted consistent with all statutory requirements of Section 4 of
12 the ESA and appropriate Service policy.

14 2. In the event that the Service determines in the course of the status review referenced in
15 Paragraph 1 that the longfin smelt rangewide does not warrant listing as threatened or
16 endangered in all or a significant portion of its range, the Service will, in the same 12-month
17 finding to be completed by September 30, 2011, consider whether any population of longfin
18 smelt qualifies as a DPS. In considering whether any population of longfin smelt qualifies as a
19 DPS, the Service will reconsider whether the SFBD population of the longfin smelt constitutes a
20 distinct population segment.

23 3. If the Service concludes in the status review referenced in Paragraphs 1-2 that one or
24 more populations of longfin smelt constitute a DPS, the 12-month finding will include a 5-factor
25 analysis on the qualifying population(s) to determine whether listing is warranted.

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¹ 12-month finding refers to the agency's published determination of whether the petitioned
28 action is warranted, not warranted, or warranted-but-precluded, after evaluating the status of a
species. 16 U.S.C. § 1533(b)(3)(B).

1 4. The Service will, within 60 days from the date of court approval of this Agreement,
2 submit a public notice of the initiation of the status review referenced in Paragraphs 1-3 for
3 publication in the Federal Register to open an official public comment period.
4

5 5. This Agreement only requires the Defendants to take actions by the deadlines
6 specified in paragraphs 1-4 and does not limit the Defendants' authority with regard to the
7 substantive outcome of any determinations. To challenge any final determination issued in
8 accordance with this Agreement, Plaintiffs will be required to file a separate action. Plaintiffs do
9 not waive their ability to challenge substantive decisions made by the Defendants pursuant to
10 paragraphs 1-4, above, and Defendants do not waive any applicable defenses.
11

12 6. The Order entering this Agreement may be modified by the Court upon good cause
13 shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the
14 parties filed with and approved by the Court, or upon written motion filed by one of the parties
15 and granted by the Court. In the event that either party seeks to modify the terms of this
16 Agreement, including the deadline for the actions specified in paragraphs 1-4, or in the event of a
17 dispute arising out of or relating to this Agreement, or in the event that either party believes that
18 the other party has failed to comply with any term or condition of this Agreement, the party
19 seeking the modification, raising the dispute, or seeking enforcement shall provide the other
20 party with notice of the claim. The parties agree that they will meet and confer (in-person not
21 required) at the earliest possible time in a good-faith effort to resolve the claim before pursuing
22 relief from the Court. If the parties are unable to resolve the claim after meeting and conferring,
23 either party may pursue relief from the Court.
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25 7. No party shall use this Agreement or the terms herein as evidence of what does or
26 does not constitute lawful evaluation of an ESA Section 4 listing proposal, or a lawful timetable
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1 therefore, in any other proceeding involving the Defendants' implementation of the ESA or any
2 other statute.

3 8. Defendants agree that Plaintiffs are the "prevailing party" in this action, and agree to
4 pay to Plaintiffs' reasonable attorneys' fees and costs, pursuant to Section 11(g) of the ESA, 16
5 U.S.C. § 1540(g). Therefore, Defendants agree to settle all of Plaintiffs' claims for costs and
6 attorneys' fees in the above-captioned litigation for a total of \$17,880. A check will be made
7 payable in that amount to Center for Biological Diversity and transmitted to Jaclyn Lopez,
8 Center for Biological Diversity, 351 California Street, Suite 600, San Francisco, CA 94104.
9

10 9. Defendants agree to submit all necessary paperwork for the processing of the
11 attorneys' fee award to the Department of the Treasury's Judgment Fund Office, pursuant to 16
12 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the court order approving this
13 Agreement.

14 10. Plaintiffs agree to accept payment of \$17,880 in full satisfaction of any and all claims
15 for attorneys' fees and costs of litigation to which Plaintiffs are entitled in the above-captioned
16 litigation, up to and including the date of this Agreement. Plaintiffs agree that receipt of this
17 payment from Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and
18 costs in this matter, through and including the date of this Agreement.

19 11. The parties agree that Plaintiffs reserve the right to seek additional fees and costs
20 incurred subsequent to this Agreement arising from a need to enforce or defend against efforts to
21 modify the underlying schedule outlined in paragraphs 1-4, or for any other unforeseen
22 continuation of this action. By this Agreement, Defendants do not waive any right to contest
23 fees claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate, in any future litigation,
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1 or continuation of the present action. Further, this Agreement as to attorneys' fees and costs has
2 no precedential value and shall not be used as evidence in any other attorneys' fees litigation.
3

4 12. No provision of this Agreement shall be interpreted as, or constitute, a commitment
5 or requirement that Defendants take action in contravention of the ESA, the Administrative
6 Procedure Act ("APA"), or any other law or regulation, either substantive or procedural.
7 Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the
8 Service by the ESA, the APA, or general principles of administrative law with respect to the
9 procedures to be followed in making any determination required herein, or as to the substance of
10 any final determination.
11

12 13. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement
13 that the Federal Defendants are obligated to pay any funds exceeding those available, or take any
14 action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
15 appropriations law.
16

17 14. The parties agree that this Agreement was negotiated in good faith and constitutes a
18 settlement of claims that were disputed by the parties. By entering into this Agreement no party
19 waives any claim or defense, except as expressly stated herein.
20

21 15. The undersigned representatives of each party certify that they are fully authorized
22 by the party or parties they represent to agree to the Court's entry of the terms and conditions of
23 this Agreement and do hereby agree to the terms herein.
24

25 16. The terms of this Agreement shall become effective upon entry of an order by the
Court ratifying the Agreement.
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27 17. Upon entry of this Agreement by the Court, all counts of Plaintiffs' Complaint shall
28 be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).
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1 Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully request
2 that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to
3 resolve any motions to modify such terms, until the 12-month finding referenced in Paragraphs
4 1-3 is published in the Federal Register. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
5 U.S. 375 (1994).

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7 Respectfully submitted this 1st day of February, 2011,

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10 IGNACIA S. MORENO, Assistant Attorney General
11 SETH M. BARSKY, Assistant Chief

12 /s/ Daniel J. Pollak
13 DANIEL J. POLLAK (Cal. Bar No. 264285)
14 Trial Attorney
15 U.S. Department of Justice
16 Environment & Natural Resources Division
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19 Attorneys for Federal Defendants
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21 /s/ Jaclyn M. Lopez (with permission)
22 JACLYN M. LOPEZ (Cal. Bar No. 258589)
23 LISA T. BELENKY (Cal. Bar No. 203225)
24 Center for Biological Diversity
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Email: jlopez@biologicaldiversity.org
lbelenky@biologicaldiversity.org

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27 Attorneys for Plaintiffs
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2 PURSUANT TO STIPULATION, IT IS SO ORDERED.
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4 Dated: February 1 ___, 2011

5 Honorable Marilyn H. Patel
6 United States District Judge
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st Day of February, 2011, I caused a copy of the foregoing Stipulated Settlement Agreement to be served on the counsel of record by means of the Court's electronic filing system:

Jaclyn M. Lopez
jlopez@biologicaldiversity.org

Lisa T. Belenky
lbelenyk@biologicaldiversity.org

/s/ Daniel Pollak
DANIEL POLLAK